Chapter on the law of trading and Transactions similar to sales

EXCHANGE OF MONEY

The Risala: A Treatise on Maliki Fiqh

'Abdullah ibn Abi Zayd al-Qayrawani (310/922 - 386/996)

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(Including commentary from *ath-Thamr ad-Dani* by al-Azhari)
Abu Muhammad 'Abdullah, a Maliki faqih known as "Shaykh al-Faqih" and "little Malik". He was the head of the Maliki school in Qayrawan. He wrote *ar-Risala* and *an-Nawadir* and several other books. (His biography in the ***Tartib al-Madarik***)

34.01 EXCHANGE OF MONEY

If a man is rich, it is incumbent upon him to employ a servant for his wife, and he must also maintain his slaves and provide shrouds for them when they die.
However, there are divergent opinions amongst jurists as to whether or not he is under an obligation to provide for the shrouds of his dead wife. According to the view of Ibn al-Qasim (a famous jurist), the expenses of such shrouds should be met from the wife's own property. But Abd al-Malik (another jurist) is of the opinion that such expense must come from the property of the husband.
Sahnun (yet another famous Maliki jurist) is of the opinion that if the wife is rich, the cost of the shrouds should come from her property, and if she is poor then it must come from the property of the husband.
God made trading and sales lawful but He forbade 'riba', i.e. usury. Usury used to be in pre-Islamic times in this manner: a debt is contracted subject to the condition that it be repaid at a specified time; if not, the debtor is to pay the creditor a rateable amount to be added to the principal. If the riba (usury) is not conducted in this form, whereby a delay may earn an increase, it may take the form of bartering silver and gold for gold, in which one of the parties gives more than he received. It is not lawful to exchange silver or exchange gold with gold except in equal quantities in direct and immediate exchange. The exchange of silver with gold shall be considered usury, except when done with immediate effect.

34.02 EXCHANGE OF FOODSTUFFS

In respect of foodstuffs such as cereals, legumes and similar things, which can be stored, all kinds of foodstuffs and condiments, it is unlawful to exchange those of the same type, except by giving quantities and with immediate effect. It is not lawful for one party to delay compliance with these rules. It is not lawful to exchange foodstuff with foodstuff, whether of the same type or not and whether of the type that can be stored or not, when one or both parties are permitted to delay compliance with meeting their obligation.
There is no harm in exchanging fruits and vegetables and other things that cannot be stored, while one party gives more to the other even if they are of the same type, through direct exchange. It is not lawful for one party to give more to the other in respect of commodities of the same type and which can be stored, such as

dried fruits and other condiments, foodstuffs and drinks, except water alone.
As for commodities of different types such as grains, fruits and foodstuffs, there is no harm in one party giving more to the other in direct immediate exchange. In exchanging commodities of one type it is not lawful for one party to give more than it receives except in respect of vegetable and fruits.
Wheat, barley and husk-less barley are considered as one category in respect of lawfulness and unlawfulness. Raisins of all types are considered as one type.
Similarly dried dates are all considered one type also. Legumes are considered to consist of many types in respect of trading. But Imam Malik held a different view on this. Imam Malik considered legumes to consist of one type for the purpose of alms-giving. The flesh of quadrupeds, whether tame or wild, is considered to be of the same type. Further, the flesh of all birds is considered to consist of one type. Again, the flesh of all aquatic animals is considered to be of the same type. Any fat extracted from the flesh of animals regarded as one type is considered like the flesh to be of one type. The milk of that type mentioned as well as the cheese and ghee are all considered as one type.

34.03 SELLING GOODS NOT YET POSSESSED

Whoever buys foodstuffs it will not be lawful for him to sell them off before he takes them over, if the purchase is done through weighing measuring or counting. However he is permitted to do that if he bought the foodstuff en bloc.
The same rule applies to all foodstuffs, condiments and drinks, with the exception of water alone. :Now, if the commodity to be sold happens to be drugs or legumes from which oil cannot be extracted, then it will not be unlawful to be sold before it was received after purchase. In trading such legumes one party can give more than it receives of that same commodity.
There is no harm for foodstuffs bought on credit to be sold before they are taken over. There is no harm in joint purchase or resale at cost price or revocation of a sale of measured foodstuff before it is taken over.

34.04 SELLING AT A RISK

Every sale or hire or rental contract which involves some hazard or uncertainty in respect of price or the object of sale, or uncertainty as to the time payment shall be due, is not lawful. It is not lawful for

a sale to involve uncertainty nor is it lawful to sell an unknown commodity. Besides, it is not lawful to sell a commodity the payment for which is due at an unknown time.

34.05 SELLING GOODS WITH HIDDEN DEFECTS

It is unlawful in trading to swindle, cheat or lie in respect of price or to deceive.
Nor is it lawful to hide defects; nor is it lawful to mix a commodity of poor quality with one of good quality. Further it is not lawful for a seller to hide some nature of his commodity, the mention of which might stop the buyer from buying it, or to hide a defect the mention of which might lower the price.
Whoever buys a slave and then finds some defects in him, he has the right to keep him without claiming anything, or he can take him back to the seller and recover the price except where another defect has occurred in the slave while in the possession of the new buyer. The buyer can then claim the value of the old defect from the price. Or he can give him back to the seller and give to the value of the new defect. Now when the buyer rejects a slave whom he exploited due to a defect, he shall be free to enjoy the benefit of any service already given.

34.06 SELLING MERCHANDISE ON TRIAL (KHIYAR), A SLAVE WITH A GUARANTEE ('UHDA), OR A SLAVE WOMAN IN SECLUSION (MUWADA'A)

It is lawful in a contract of sale to have the right of withdrawal when the contracting parties agree upon a short period, long enough to permit the buyer to examine the commodity, or long enough to enable the buyer to take advice with respect to the commodity. It is not lawful in such a case for the price to be paid promptly. The same applies in the case of an 'uhdah' of three days. 'Uhdah' is an agreement for time allowed within which to withdraw from the contract. It is not lawful for the price to be paid promptly while the commodity is a slave girl, who shall be kept for some time to ascertain whether or not she is pregnant.
When the slave girl was thus being kept, the responsibility of maintaining her or bearing any loss in the event of something happening to her, shall be borne by the seller.
The type of slave girl kept to ascertain whether she is pregnant or not is the one kept to go to bed with, in most cases, or one the seller admitted having had sexual intercourse with, even if she is ugly. It is not lawful for a seller of a slave girl to disclaim

responsibility for a pregnancy except when such a pregnancy was evident.
It is lawful in the sale of slaves for the seller to disclaim responsibility for defects he did not know of. Again a mother and her child are not separated in a sale until the child begins to cut its second teeth.

34.07 RESPONSIBILITY (DAMAN) IN AN INVALID SALE

In the event of a sale contract becoming void, whatever loss in incurred shall be borne by the seller. But if the buyer has taken delivery, then the buyer shall bear the loss from the day he has taken delivery. If the market conditions change or if there are certain changes in the body of the slave, then the buyer shall pay the seller the value of the slave on the day he took him over. But if the object of sale is of the type that can be weighed or measured, the buyer shall not return it to the seller; however, he can return to the seller the same quantity.

34.08 CAPITAL LOANS FOR BORROWERS PROFIT (SALAF)

The right of the buyer to withdraw from a contract of sale in respect of landed property shall continue to exist despite a change in the price of such properties in the market. It is not lawful to give a loan which can lead to a gain by the giver. Further it is not lawful to combine a sale and a loan in a single contract. Similarly it is not lawful to combine a loan with something similar to it such as a hire or rental. It is lawful to give out on loan anything other than slave girls. Also it is not lawful to give silver ore on loan.

34.09 SURRENDERING BORROWED OR SOLD PROPERTY

Besides this it is not lawful for a lender to give a rebate in order to make the debt fall due earlier. Nor is it lawful to charge an extra amount in order to postpone payment. Again it is not lawful to make the buyer take over the commodity before time, and to give him an extra amount for doing that, in the case of a sale contract. There is no harm in handing over the commodity to the buyer earlier, in respect of a loan, that is, if the increase is in respect of quality only.
There are differences of opinion as to whether a person can give more than what was loaned to him when he comes to pay off a

loan, when there was no stipulation or promise or custom making that necessary. Ash-hab, a Maliki jurist, permitted that, while Ibn al-Qasim, another Maliki jurist, considered it reprehensible and did not sanction it.
When a person owes some gold or silver pieces as a result of a contract of sale or some loan which is to take some time before it is due for payment, such a person is permitted to pay off the debt earlier than the stipulated time it shall be due. Similarly, he is permitted to hasten giving a commodity or foodstuff he owes as a result of a loan or a sale contract.

34.10 SOME RISKY THINGS WHICH MAY NOT BE SOLD

It is permitted to sell fruit or grains which did not appear to be fully ripe. However it shall be permissible to sell them if at least some of it is fully ripe, even if this happens to be one date palm out of many date palms.
It is not lawful to sell fish while still at large in rivers or pools. Nor is it permissible to sell a foetus while in its mother's womb, nor is it lawful to sell what is in the wombs of other animals nor to sell the semen of male camels which shall produce young when they cross female ones.
Again it is not lawful to sell a runaway slave while at large, nor a stray camel.

34.11 DOGS

It is also prohibited to sell dogs, but jurists disagree as to the lawfulness of selling those dogs people are permitted to keep. However anybody who kills a dog of the type people are permitted to keep shall pay for it.

34.12 MUZABANA EXCHANGE OF THE SAME KIND OF FOODSTUFF, AND USURIOUS PAYMENT

It is unlawful to give meat in exchange for an animal of the same type; nor is it lawful to combine two contracts of sale in a single contract - that can arise when a person buys a commodity at five gold pieces for cash, or ten gold pieces on credit. He can only stick to one price.
It is unlawful to exchange ripe dates with dried ones or raisins with grapes. In this respect neither greater nor equal amounts can be received in the exchange. Nor may ripe juicy ones be exchanged for dried ones of the same type of the rest of fruits. That is

prohibited because it involves selling or exchanging a thing in return for something unknown. Commodities, further, are not exchangeable, some measured in return of others en bloc of the same type; nor some en bloc in exchange of others also en bloc, of the same type: except where it is evident that the quantity of one is greater than that of the other, in respect of a commodity in which it is lawful to exchange unequal quantities in respect of commodities of the same type.

34.13 SELLING ABSENT GOODS

There is no harm in selling a commodity which is absent when it is described. But such a contract payment must not be made except where the article of sale is near or of the type that cannot easily change, such as a house or a piece of land or a tree. In such a circumstance payment can be made.

34.14 A GUARANTEE (UHDA) IN SELLING A SLAVE

In the sale of slaves, it is lawful to have an agreement between the contracting parties to allow time within which the buyer can claim his money back if he finds some defects in them. That shall be when the guarantee has been stipulated. A guarantee is also given in respect of a slave girl who is present in town for three days. Liability to bear any loss shall be upon the seller in respect of anything which arises. The period of guarantee in the purchase of a slave shall extend to a whole year in respect of madness or leprosy.

34.15 SALE WITH ADVANCE PAYMENT (SALAM)

There is no harm in respect of forward-buying in the case of commodities, slaves, animals, foodstuffs and condiments, with specific description for a specific time limit.
The price can be paid promptly or it can be deferred for two or three days if it has been made a condition.
It is preferable to us that the commodity bought through forward-buying shall be delivered within fifteen days, or that it shall be received in a different locality, even if the distance of that locality is a two or three days journey.
More than one Maliki jurist has approved that the goods bought in a 'salam' should be delivered within three days in the very town in which it is transacted; but some other jurists considered that reprehensible.

34.21 EXAMINING ITEMS

There is no harm in buying commodities in a sack when the contents are described and made known. But it is not lawful to buy clothes that cannot be unfolded or described, or at night in the darkness, where people cannot look at it or recognise what is in it. Similarly, it is unlawful to sell an animal at night in the darkness.

34.22 BIDDING (SAWM)

A person must not outbid the bid of his brother Muslim, and that is when the contracting parties are about to reach an agreement, not at the beginning of the offer-making. A contract of sale is concluded through speech when the parties are not separated.

34.23 SELLING SERVICES BY TIME (IJARA) OR BY JOB (JU'L), AND SELLING THE USE OF PROPERTY (KIRA')

The contract of hire is lawful when they agree upon time and the money to be paid.

In a contract to bring back a runaway slave or stray camel, or digging a well or selling clothes and the like, upon which payment will be in the form of a reward, no limit shall be agreed upon. The person thus hired shall not be entitled to payment except upon the completion of the assignment.

If a person is hired to sell something within a given time, upon the completion of the time agreed he shall be entitled to the wage, even if he did not sell the commodity. If he should complete selling the articles within half the appointed time, he shall be entitled to half the wage.

The contract of hire is like that of sale in respect of the rules of lawfulness and unlawfulness.

If a person should hire a specific animal to go to a specific town and the animal dies, the contract lapses for the remainder of the journey. The same rule applies in respect of a person hired who subsequently dies; so also in the case of a house rented which collapses before the period of rent expires.

There is no harm in agreeing with a teacher to teach the Qur'an until the pupils master it, nor in agreeing with a physician to cure a sick person.

The death of a hirer of an animal, or a tenant or a hirer of a flock of sheep does not cause the agreement to lapse. The rent agreed upon must still be paid.

If in a guarantee hire, the beast hired out dies before reaching the agreed destination, the owner of the beast shall provide a fresh one to complete the journey. And if the rider should die, the contract shall nevertheless remain valid, while the beast is hired out to another rider.
If a man should hire a piece of household implement or something else, he shall not be liable to pay for it if it gets damaged or lost. Besides the man who took the hire is to be believed in what he says about the implement unless it is evident that he is lying.
Craftsmen shall be liable to pay for those things they take away to work on, whether they are going to receive a wage for the work or not.
The proprietor of a public bath is under no liability to pay for any loss or damage incurred by his clients while there. Similarly the owner of the boat is not liable to make good any loss or damage suffered by passengers. But he is not entitled to any fares until upon reaching the destination.

34.24 PARTNERSHIP (SHIRAKA) OF LABOUR AND CAPITAL

There is no harm in hiring out labour jointly; that shall be when the partners work in one place and undertake the same kind of work or a similar kind. Further it is lawful for two people to form a company through pooling capital, on condition that the profit is shared in proportion to the size of shares held by the partners. The work also shall be shared according to what the partners stipulated in sharing the profit. It is not lawful for the capital contributed by the two partners to be unequal while they share the profit they gain equally.

34.25 TRADE LOANS (QARD)

Qirad is lawful. It means an arrangement of a partnership where one person furnishes the capital and another works with it, and the profit is shared. It is lawful when gold or silver pieces are advanced. It is also lawful even when irregular pieces of gold and silver are advanced. But it is not lawful when the capital provided consists of commodities; and if it should take place, the status of the seller will be that of a person hired for the sale. And the wage he should be paid should be equal to that realised in a qirad whose capital is the same as the value of the commodity.
A person hired in a qirad shall be given clothing and food if he travels and if the capital is considerable. Usually he should be

provided with clothes if the journey is a long one. Partners in a qirad do not divide the profit until the whole capital is reduced to cash.

34.26 LEASING AN ORCHARD (MUSAQAT)

The contract of irrigation is lawful in respect of trees on the amount the contracting parties agree upon. All the work shall be the responsibility of the man hired to irrigate.

It should not be stipulated that the man who irrigates should carry out any other work besides irrigation. He should not be asked to perform any work connected with the wall surrounding the farm, except very little such as mending the fence and mending the 'dafirah', that is, the junction of the camels. He should not be asked to build fresh dafirahs. The responsibility of pollinating dates palms is that of the irrigator. It is also the responsibility of the person hired to irrigate to clean the bottom of trees and to look after the place where water falls from the bucket.

It is also part of his job to deepen the well if need be and to carry out similar jobs.

It is not a part of the responsibility of the irrigator to drive out animals from inside the farm. If any animal he works with dies, it is the responsibility of the owners of the farm to give a substitute. It is also the responsibility of the man hired to feed the animals and other people he works with. Similarly, it is his responsibility to plant trees where they are deficient, but there is no harm of he is relieved of that.

That is more lawful for the owner of the farm. But if the area deficient of trees is large, it shall not be made the responsibility of a person hired to irrigate date palms. However, it can be made his responsibility if it is a third of the total area or less.

34.27 FARMING PARTNERSHIP

It is permissible for two people to form a partnership for the purpose of farming where the crops jointly belong to them, whether the land comes from one of them and the labour from the other, or the labour comes from both of them, and whether they hire land or it belongs to them.

It is not lawful for the seeds to come from one of them and the land from the other and the labour from one of them or from two of them and yet the two divide the yield equally. But they can divide the yield equally when they both hire the land and the seed is from one of them while the other supplies labour, and when the value of the

undertakings is not much different. Payment for the hire of a piece of land which is not secure must not be made before the land is watered.

34.28 LIABILITY FOR DAMAGE TO CROPS SOLD AND NOT YET CLAIMED

If a person bought some fruits while still on the trees and then they were damaged by cold weather or locusts or ice or something else, and if the extent of the fruit damaged reached one third of the total, then one third of the total value is waived for the buyer. But damage of less than one third is borne by the buyer.
There is no damage in respect of crops, nor in respect of fruits already dried when bought. But a loss due to damage in vegetables is to be borne by the seller even when the damage is negligible. But according to some jurists only loss through damage of at least one third of the crop shall be borne by the seller.

34.29 GIFT OF FRUIT WHICH CAN BE DRIED ('ARIYYA)

If a man gives to another as a present the fruits of some of the date palms in his garden, there is no harm if he subsequently buys them from the man to whom he donated them when they ripen and are in accordance to their measure, if they are up to five wasqs or less. It is not lawful for him to buy more than five wasqs except by giving cash or some commodity in exchange.